Supreme Court, U.S.
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No. 98-380

In The

Supreme Court of the United States

October Term, 1997

BANK ONE, MILWAUKEE, N.A.,

Petitioner,

vs.

P. A. BERGNER & CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES J. HANSEN
Vice President and Associate General Counsel
Saks Incorporated
750 Lakeshore Parkway
Birmingham, AL 35211
(205) 940-4600

PROFESSOR ELIZABETH WARREN
Counsel of Record
Cambridge, MA 02138
(617) 495-3101

AMY R. WOLF
DOUGLAS K. MAYER
DAVID C. BRYAN
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

Attorneys for Respondent

148853

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

The successor in interest to Respondent P.A. Bergner & Co. is Carson Pirie Scott & Co. Carson Pirie Scott & Co. has no nonwholly owned subsidiaries and its parent company is Saks Incorporated.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Writ	5
A. This Case Does Not Present the Questions That Petitioner Contends It Presents.	5
1. The Seventh Circuit Did Not Rule That New Value Must Come Directly From the Preferred Creditor.	6
2. The Seventh Circuit Did Not Rule That the Ordinary Course Defense Requires Proof of Similar Payments in the Past While the Debtor Was Still Healthy.	7
B. Petitioner Has Failed to Show That the Seventh Circuit Rendered a Decision in Conflict With a Decision of Any Other Court Of Appeals.	10
1. The Seventh Circuit's Rejection of the New Value Defense in This Case Is Not Inconsistent With Decisions of Other Circuits.	10

Table of Contents

Page

2. The Seventh Circuit's Rejection of the Ordinary Course Defense in This Case Is Not Inconsistent With Decisions of Other Circuits. 14

Conclusion 17

TABLE OF CITED AUTHORITIES

Page

Cases:

Barnhill v. *Johnson*, 503 U.S. 393 (1992) 9

In re Energy Coop., Inc., 832 F.2d 997 (7th Cir. 1987) 6, 7

In re E.R. Fegert, Inc., 887 F.2d 955 (9th Cir. 1989) .. 12, 13

In re Finn, 909 F.2d 903 (1990) 14, 15

In re Fuel Oil Supply & Terminaling, Inc., 837 F.2d 224 (5th Cir. 1988) 10, 11, 12

In re Jeffrey Bigelow Design Group, Inc., 956 F.2d 479 (4th Cir. 1992) 16

In re Jones Truck Lines, Inc., 130 F.3d 323 (8th Cir. 1997) 13

In re Kumar Bavishi & Assoc., 906 F.2d 942 (3d Cir. 1990) 13

In re Midway Airlines, Inc., 69 F.3d 792 (7th Cir. 1995) 7

In re Milwaukee Cheese Wisconsin, Inc., 112 F.3d 845 (7th Cir. 1997) 9

In re Powerine Oil Co., 59 F.3d 969 (9th Cir. 1995), *cert. denied*, 516 U.S. 1140 (1996) 12

Table of Cited Authorities

Page

In re Roblin Industries, Inc., 78 F.3d 30 (2d Cir. 1996) 15

In re Tolona Pizza Prods. Corp., 3 F.3d 1029 (7th Cir. 1993) 7, 8

In re U.S.A. Inns of Eureka Springs, Arkansas, Inc., 9 F.3d 680 (8th Cir. 1993) 15, 16

Union Bank v. *Wolas*, 502 U.S. 151 (1991) 7, 16

Statutes:

11 U.S.C. § 547(a)(2) 11

11 U.S.C. § 547(c)(1) 5, 6, 12

11 U.S.C. § 547(c)(1)(A) 6

11 U.S.C. § 547(c)(2) 5, 7, 8, 14

11 U.S.C. § 547(c)(2)(A) 14, 16

11 U.S.C. § 547(c)(2)(B) 9, 14, 15, 16

11 U.S.C. § 547(c)(2)(C) 15, 16

Table of Cited Authorities

Page

Other Authorities:

H.R. Rep. No. 95-595, p. 117-78 (1977) 16

4 L. King, *Collier on Bankruptcy* ¶ 547.09 (15th Ed. 1995) 6

U.S. Code Cong. & Admin. News 1978 16

STATEMENT OF THE CASE

Petitioner Bank One, Milwaukee, N.A. ("Bank One" or the "Bank") seeks review of a unanimous opinion of the Seventh Circuit Court of Appeals, which affirmed a thorough opinion of the District Court for the Eastern District of Wisconsin, which itself affirmed the thorough opinion of the Bankruptcy Court for the Eastern District of Wisconsin granting summary judgment for Respondent P.A. Bergner & Co. ("Bergner"). Each of these courts found that Petitioner had received voidable preferences when it received transfers of $31,207,000 and $6,358,000 from the soon-to-be chapter 11 debtor Bergner on account of the Bank's unsecured claims, the first transfer 34 days and the second minutes before bankruptcy. The Petition relies on several irrelevant and manufactured conflicts between the decision of the Seventh Circuit and rulings of other Circuits as a basis for issuance of a Writ of Certiorari. In fact, the Petition states no credible basis for this Court to review what is, in reality, an ordinary preference action.

Prior to Bergner's bankruptcy filing, Bank One had served as Bergner's primary cash management bank. Pet. App. 2a.[1] In 1989, Bergner and Bank One entered into a Standby Letter of Credit Agreement (the "SLCA") (App. 289),[2] under which Bank One agreed to issue standby letters of credit for Bergner's account. Pet. App. 2a-3a. Thereafter, Bank One issued unsecured letters of credit to two of Bergner's suppliers, Associated Merchandising Corporation ("AMC") (App. 214-31) and Liberty Mutual Insurance Company ("Liberty") (App. 275-77, 402-03, 445-76). Bergner paid Bank One annual fees of approximately $300,000 for these letters of credit. Pet. App. 6a.

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1. Citations to "Pet. App." refer to pages of the Petitioner's Appendix filed in this Court.

2. Citations to "App." refer to pages of the Joint Appendix and Bergner's Supplemental Appendix filed in the Seventh Circuit.

AMC is a cooperative that purchases goods overseas for its member department store chains. App. 45. Although AMC had placed orders on Bergner's behalf without any security for many years, in July 1989, after Bergner made a highly leveraged acquisition, AMC required Bergner to post a letter of credit to assure payment for orders that AMC would place for Bergner thereafter. The face amount of the letters of credit issued by Bank One was set by reference to the amount of orders that AMC had outstanding for Bergner at any given time, and was amended from time to time as the outstanding orders moved up or down. Pet. App. 5a. Liberty was Bergner's insurer, and similarly required a standby letter of credit to provide independent assurance that Bergner's payment obligations for insurance coverage would be satisfied. App. 361-63 §§ 8-11.

In each of its letters of credit, Bank One unconditionally promised the beneficiary, AMC or Liberty, "that drafts drawn under and in compliance with the terms of this credit will be duly honored if presented on or before the expiry date." App. 215. The letters of credit were "evergreen," meaning that they would renew automatically from year to year unless Bank One were to give the beneficiaries 60 days' notice of non-renewal. Pet. App. 4a-5a. If Bank One were to choose not to renew the letters of credit, the beneficiaries would be entitled to draw in full and apply the proceeds against Bergner's obligations as they became due and payable. *Id.* [3]

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3. Bank One repeatedly mischaracterizes the status of Bergner's relationship with AMC and Liberty at the time the preferential transfers were made to create the impression that Bergner had no outstanding debt to those entities. The uncontroverted evidence was to the contrary, and the courts below so found. Pet. App. 5a, 68a-69a. Indeed, the very purpose of a standby letter of credit is to backstop the obligation of the bank's customer to the beneficiary with the bank's credit. It was precisely because AMC was taking on Bergner's credit risk by placing orders on

(Cont'd)

Under section 1 of the SLCA, Bank One had a claim against Bergner for payment of "the amount of any draft drawn under, or purporting to be drawn under, a Credit, such payment to be made at or before presentation of the draft." App. 290. Although the SLCA gave Bank One a lien on and right of setoff against the funds in Bergner's deposit account at the Bank and the right to request additional collateral (Pet. App. 3a), Bank One never demanded any minimum balance or collateral when issuing, renewing or amending the AMC letters of credit, and never did so with respect to the Liberty letters of credit until some three weeks before bankruptcy. *Id.* 23a-24a. Bank One had thus agreed that in the event a draw occurred under any letter of credit, it would be an unsecured creditor of Bergner for the amount of such draw.

In May 1991, Bergner's financial condition began to deteriorate, and as a result, Bank One decided to attempt to eliminate its unsecured credit exposure to Bergner. Pet. App. 21a. Bank One informed Bergner that it would require collateral to renew the letters of credit (which Bergner was unable to provide) and gave notice of nonrenewal to AMC and Liberty. Pet. App. 7a; App. 265, 410. On July 16, Bergner advised Bank One that AMC would soon draw under its letter of credit because it was not being renewed. Pet. App. 7a. Knowing that failure to pay Bank One as required by the SLCA would cross-default its $300 million credit agreement with its bank lenders, Bergner informed Bank One that it would borrow from those banks to make the payment. *Id.*; App. 266, 272.

(Cont'd)

its behalf with overseas manufacturers but not invoicing Bergner until the goods were actually shipped that the letter of credit issued by Petitioner was required. Pet. App. 69a. Similarly, Liberty was assuming credit risk in its provision of insurance coverage to Bergner, and by issuing the letter of credit to Liberty, Bank One assumed that exposure. *Id.* 71a.

On July 19, 1991, AMC drew under its letter of credit. Pet. App. 7a. Bergner borrowed $31,000,000 from its bank lenders, which was wired into Bergner's account at Bank One. *Id.* Bank One then "memo posted" a debit to the account, making $31,207,000 unavailable to Bergner, honored AMC's draw by wiring $31,207,000 to AMC's bank and, at the end of the day, debited Bergner's account for $31,207,000 and closed out the letter of credit on its books. *Id.* 7a-8a.

Following Bank One's decision not to renew its letter of credit, Liberty had informed Bergner that it would draw unless it received a replacement letter of credit. Pet. App. 8a. On July 29, 1991, Bank One issued a $6,358,000 replacement unsecured letter of credit in favor of Liberty. App. 253-54. On July 31, after learning from Bergner that its bank lenders had declared a "material adverse change" (Pet. App. 8a), Bank One demanded that Bergner deposit and maintain a minimum of $6,400,000 in its account at Bank One to secure the Bank's exposure on account of the Liberty letter of credit. App. 200-01, 369-72.

On August 23, 1991, Bergner informed Bank One that it would file for bankruptcy that day, and Bank One, in its own words, "set off" $6,358,000 in Bergner's account. App. 207. Liberty drew the entire amount of the letter of credit over time following the bankruptcy filing. App. 184-85.

On August 23, 1991, Bergner and its affiliates filed chapter 11 petitions with the United States Bankruptcy Court for the Eastern District of Wisconsin. Pet. App. 9a. Bergner's unsecured creditors ultimately received 33¢ on the dollar for their claims under Bergner's plan of reorganization. *Id.* 13a. By contrast, because it had already been paid in full, Bank One filed no claims under the SLCA in the Bergner bankruptcy.

In August 1992, after due demand had been made, Bergner commenced this action against Bank One for recovery of the

$31,207,000 and $6,358,000 transfers as either voidable preferences or setoffs. The Bankruptcy Court granted Bergner summary judgment on both alternative theories, and the District Court affirmed. The Court of Appeals affirmed the judgment on the preference counts and therefore found that it did not need to reach the issue of setoff.[4]

Petitioner now seeks review of only the preference judgments. A grant of such review would thus avail Petitioner nothing, as Petitioner will suffer the identical judgment on the basis of the alternative setoff counts.

REASONS FOR DENYING THE WRIT

A.

THIS CASE DOES NOT PRESENT THE QUESTIONS THAT PETITIONER CONTENDS IT PRESENTS.

This case does not merit certiorari review for several reasons. First, and most fundamentally, this case does not present the questions that Petitioner contends it presents.

According to Petitioner, the decision by the Seventh Circuit to affirm the judgment against Petitioner was predicated on two erroneous purported rulings by that Court: *First*, Petitioner could not prevail on its "new value" defense under 11 U.S.C. § 547(c)(1) because the "new value" must come from the preferred creditor directly, and here the "new value" came from third parties, AMC and Liberty. *Second*, Petitioner could not prevail on its "ordinary course" defense under 11 U.S.C. § 547(c)(2) because that defense requires proof of similar payments to the preferred creditor while

4. The only matter on which the Court of Appeals reversed the Bankruptcy Court was for its failure to award Bergner pre-judgment interest, which the Court considered an "abuse of discretion." Pet. App. 26a.

the debtor was still healthy and Petitioner did not demonstrate that Bergner had made such payments to it in the past. Petitioner has mischaracterized the decision of the Seventh Circuit in both of these respects.

1. The Seventh Circuit Did Not Rule That New Value Must Come Directly From the Preferred Creditor.

The "new value" defense, 11 U.S.C. § 547(c)(1), protects from recovery transfers by the debtor to a creditor during the preference period "that are not really on account of an antecedent debt." *In re Energy Coop., Inc.*, 832 F.2d 997, 1003 (7th Cir. 1987) (quoting legislative history). It shields an exchange for new value, such as a purchase of goods with a check, that would constitute a preference only because of the impracticalities of a truly simultaneous exchange. *See* 4 L. King, *Collier on Bankruptcy* ¶ 547.09 at 547-49 and n.2 (15th Ed. 1995). Thus, the statute requires the creditor to demonstrate that the otherwise preferential transfer it received was "intended by the debtor and the creditor . . . to be a contemporaneous exchange for new value given to the debtor. . . ." 11 U.S.C. § 547(c)(1)(A).

In this case, Petitioner could not and did not establish that the parties intended that Bergner would pay Bank One the amount of the letter of credit draws *in exchange* for Bank One's paying the beneficiaries. Rather, the Seventh Circuit held that Bergner made its payments to Bank One to fulfill its contractual obligations to the bank, and Bank One made its payments under the letters of credit to satisfy its own independent obligations to AMC and Liberty. These two independent acts, the Seventh Circuit found, did not constitute the "intended" "exchange" for "new value" required by the statute. Pet. App. 19a-20a.

Petitioner's contention that the Seventh Circuit rejected the Bank's new value defense because the value did not come

from Bank One, but from a third party, is thus plainly inaccurate. Also without basis is Petitioner's sweeping assertion that the Seventh Circuit has "eliminat[ed] the 'new value' defense in all three-party transactions" (Petition 18). Rather, the Court of Appeals neither was required to, nor did it, make any determination applicable beyond its finding on the facts of this particular case that the debtor's payments of its obligations to the Bank and the Bank's payments of its obligations to the letter of credit beneficiaries were separate acts, each intended to pay off existing independent contractual obligations. As such, there was no "intended" "exchange" of the debtor's payments for "new value" received from AMC and Liberty as required by the statute. Pet. App. 15a-16a, 19a-20a.

2. The Seventh Circuit Did Not Rule That the Ordinary Course Defense Requires Proof of Similar Payments in the Past While the Debtor Was Still Healthy.

The preference statute deters a debtor " 'from trying to stave off [bankruptcy] by giving preferential treatment to his most importunate creditors.' " *In re Midway Airlines, Inc.*, 69 F.3d 792, 797 (7th Cir. 1995) (quoting *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993)). The "ordinary course of business" defense in 11 U.S.C. § 547(c)(2) shields from preference recovery " 'recurring, customary credit transactions' " within

> "normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or creditors during the debtor's slide into bankruptcy."

Energy Coop., 832 F.2d at 1004 (quoting legislative history); *see also Union Bank* v. *Wolas*, 502 U.S. 151, 160 (1991). Section

547(c)(2) requires a creditor to demonstrate that an otherwise preferential transfer was on account of each of the following: (A) a debt *incurred* by the debtor in the ordinary course of its business; (B) a debt *paid* in the ordinary course of the business of the debtor and the creditor; and (C) a debt paid according to *ordinary business terms* (understood by most courts to look to an objective, industry-wide norm, *see, e.g., Tolona Pizza*, 3 F.3d at 1033).

Petitioner argued below that Bergner's transfer of $31,207,000 to Bank One as a result of AMC's draw under its letter of credit due to Bank One's notice of nonrenewal qualified for the ordinary course exception.[5] The Seventh Circuit rejected this defense, holding that even assuming, *arguendo*, that subsections (A) and (C) of section 547(c)(2) had been met, the Court "[could] not find that the transfer was made in the ordinary course of [Bergner's] business." Pet. App. 21a. Contrary to Petitioner's insistence (Petition 20, *et seq.*), the Seventh Circuit made no determination that these transfers were disqualified for the ordinary course defense as a matter of law because of the absence of similar payments in the past. Rather, the Court affirmed the case-specific finding that these payments were made because of the "chain of events" whereby "Bergner's precarious financial situation" caused "Bank One's decision not to renew the AMC and Liberty Mutual letters of credit," which "culminated in" the draws under the letters of credit and Bergner's payments to Bank One. Pet. App. 21a-22a. These

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5. Prior to filing this Petition, Petitioner never before contended that the $6,358,000 seized by the Bank moments before Bergner filed bankruptcy to cover its exposure on the Liberty letter of credit was a transfer in the ordinary course of business (although the Bankruptcy Court in its thorough opinion addressed and rejected even those defenses that had not been raised). Pet. App. 100a-101a. In any event, it is obvious that the seizure of these funds on the day of bankruptcy was not the ordinary course of Bergner's business.

efforts by Bank One "to protect its position" by severing a relationship with a troubled borrower, "[w]hile understandable" (Pet. App. 22a), were simply not events which were the "ordinary course of business" for Bergner and the Bank, as required by 11 U.S.C. § 547(c)(2)(B). *Id.*

This fact-specific finding hardly involves a novel proposition of law. The Seventh Circuit saw these transfers as "paradigm[atic]" preferences, citing its opinion in *In re Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 847 (7th Cir. 1997), that a "sudden payment in full of all debts in a discrete category, in anticipation of bankruptcy and for the purpose of helping a favored class of creditors, is the paradigm of a preference." Pet. App. 21a. This finding is fully in accord with both the statutory provisions and the purpose of the section, which has been described by this Court as "designed to encourage creditors to continue to deal with troubled debtors on normal business terms." *Barnhill* v. *Johnson*, 503 U.S. 393, 402 (1992). Bank One, of course, did not "deal with" the troubled Bergner; it pulled the plug and, on the eve of bankruptcy, obtained payment in full of unsecured debts totaling $37,565,000.

B.

PETITIONER HAS FAILED TO SHOW THAT THE SEVENTH CIRCUIT RENDERED A DECISION IN CONFLICT WITH A DECISION OF ANY OTHER COURT OF APPEALS.

1. The Seventh Circuit's Rejection of the New Value Defense in This Case Is Not Inconsistent With Decisions of Other Circuits.

Petitioner contends that the decision of the Seventh Circuit conflicts with decisions of other Circuits which have upheld the use of the "new value" defense in situations in which the value was provided by a third party, and not by the allegedly preferred creditor directly. The cited cases provide no conflict with the Seventh Circuit's holding that the new value defense was inapplicable here; indeed, Respondent would prevail under the analysis employed in each of the opinions characterized by Petitioner as conflicting with the Seventh Circuit's decision.

a. Petitioner points to *In re Fuel Oil Supply & Terminaling, Inc.*, 837 F.2d 224 (5th Cir. 1988) ("*FOSTI*"), as the "seminal decision" that is purportedly at odds with the ruling here. No such inconsistency exists. The Seventh Circuit considered *FOSTI* and determined, correctly, that it was not inconsistent with the lower courts' rejection of Petitioner's "new value" defense. Pet. App. 20a-21a.

At issue in *FOSTI* were two letters of credit that the debtor had obtained to backstop its obligations to Gulf Oil Corporation under a gasoline exchange agreement. The debtor's obligations to the letter of credit bank were secured by a lien on its assets of a value at least equal to the amount of the obligations. 837 F.2d at 225. Within 90 days of bankruptcy, the debtor made

deliveries of gasoline and payments to Gulf in satisfaction of its obligations under the gasoline exchange agreement. The letters of credit thus became unnecessary; one expired undrawn and the other was cancelled with Gulf's consent. *Id.* at 226. After filing for bankruptcy, the debtor sued Gulf to recover the value of the transfers made within 90 days of bankruptcy as preferential. The Fifth Circuit found that Gulf was entitled to the protection of the new value defense because, by virtue of Gulf's receipt of the transfers from the debtor, the letters of credit were terminated so that collateral equal in value to the transfers was released to the debtor.

Petitioner's argument that this case is analogous to *FOSTI* ignores the factual differences between the two cases that go to the very heart of their differing results. The *FOSTI* letter of credit was *secured* while the Bank One letters of credit were *unsecured*. Because the letter of credit bank in *FOSTI* was fully secured, the debtor's payments to the beneficiary resulted in an even exchange for the estate — the debtor paid the obligations secured by the letters of credit and received "new value" in the release of its collateral. *FOSTI*, 837 F.2d at 228 ("The term 'new value' includes the 'release by a transferee of property previously transferred to such transferee. . . .' ") (quoting 11 U.S.C. § 547(a)(2)). As the Fifth Circuit recognized, the purpose of the preference statute was not implicated because all parties were effectively secured. If the debtor had gone into bankruptcy prior to making the payments, Gulf would have looked to its letters of credit for payment and the bank would have looked to its collateral, leaving Gulf fully paid and the estate without the value of the collateral. The debtor's pre-petition transfers to Gulf, which left Gulf fully paid and the estate with the collateral, had no preferential effect on Gulf nor any detrimental impact on the estate. *Id.* at 229-30. Here, by contrast, had Bergner gone into bankruptcy without making the challenged transfers, AMC and Liberty would have received

payment of the letters of credit from Bank One, but *Bank One would have had only an unsecured claim for pro rata distribution in Bergner's bankruptcy*. It is precisely because the payments to Bank One relieved it of the status of unsecured creditor in Bergner's bankruptcy that the transfers in this case were preferential, while in *FOSTI* neither the beneficiary nor the bank improved its existing position over the unsecured creditors.

Accordingly, the reasoning of the Fifth Circuit in *FOSTI* is fully consistent with the result reached by the Seventh Circuit here. In *FOSTI*, the debtor's payment was in exchange for the release of the bank's collateral. Here, Bergner's payment was only in satisfaction of its unsecured obligation to Bank One. Bank One — which had no collateral to release to the estate — conferred no "new value" on the estate, directly or indirectly, when it discharged its preexisting and independent contractual obligations to AMC and Liberty. The value that flowed from AMC and Liberty to Bergner was not in exchange for Bergner's preferential transfers to Bank One; rather, the estate would have received that value regardless of whether Bergner had made the transfers to Bank One. Pet. App. 20a, 93a.

b. Each of the other cases relied upon by Bank One as the basis for the purported conflict among Circuits is also fully consistent with the analysis of the Seventh Circuit. In each case, either the preferred creditor or the third party provided something new to the debtor (release of collateral, ongoing employee services, or issuance of guarantee) in exchange for the debtor's payment to the allegedly preferred creditor, as section 547(c)(1) requires. *See In re Powerine Oil Co.*, 59 F.3d 969, 973-74 (9th Cir. 1995) (Kozinski, J.) (applying *FOSTI* to hold that insofar as a letter of credit bank was undersecured, no new value was given to offset the debtor's payment to the beneficiary), *cert. denied*, 516 U.S. 1140 (1996); *In re E.R.*

Fegert, Inc., 887 F.2d 955, 958-59 (9th Cir. 1989) (payments by debtor-general contractor to subcontractor subject to new value defense because they resulted in release of equitable lien of surety, to whom subcontractors could have looked for payment). *See also In re Jones Truck Lines, Inc.*, 130 F.3d 323, 327-28 (8th Cir. 1997) (debtor's payments to union pension fund were in exchange for contemporaneous provision of services by employees which constituted new value); *In re Kumar Bavishi & Assoc.*, 906 F.2d 942, 945-46 (3d Cir. 1990) (debtor's loan repayments to limited partners were in exchange for partners' guarantees of new line of credit, without which bank would not have provided debtor with new funds). The Seventh Circuit in this case never reached, because it did not need to reach, the sweeping question whether the source of new value can be a third party.[6] Instead, it found that Bergner's payment to Bank One was not intended as an exchange for the value received from AMC and Liberty as required by the statute, but was simply payment of Bergner's pre-existing obligation to

6. Petitioner makes much of the Bankruptcy Court's statement, quoted in the Seventh Circuit's opinion, that "Bank One itself did not incur a contemporaneous corresponding obligation to Bergner at the time it seized the funds, which would be necessary for the new value defense to succeed." Pet. App. 19a-20a (quoted by Petitioner with emphasis added to *Bank One* or *itself* at Petition 6, 8 and 10). While perhaps inartfully phrased, it is clear from the context — omitted by Petitioner — that the statutory issue the Court was addressing by its reference to the Bank not having "incur[red] a contemporaneous corresponding obligation," was that the Bank was paying an *old* obligation, not providing *new* value, whether itself or through AMC, evidenced by the Court's continuing as follows:

> Bank One's obligation ran independently to AMC, and it satisfied that obligation by paying AMC. . . . Bank One was not entitled to use the new value defense to defeat the debtor's recovery of the amount it paid to Bank One as a result of the AMC letter.

Pet. App. 19a-20a.

the Bank, just as the Bank's payments under the letters of credit were intended to discharge the obligations the Bank assumed to the beneficiaries the day it issued the letters of credit. In other words, there was no *intended exchange* for *new value*, regardless of the source of that value.

Thus, the Seventh Circuit's decision in respect of the new value defense is not in conflict with a decision of any other Court of Appeals.

2. The Seventh Circuit's Rejection of the Ordinary Course Defense in This Case Is Not Inconsistent With Decisions of Other Circuits.

Petitioner contends that the Seventh Circuit's rejection of its "ordinary course" defense under 11 U.S.C. § 547(c)(2) conflicts with decisions of other Circuits in two respects. In both arguments, Petitioner again mischaracterizes the ruling of the Seventh Circuit as well as existing caselaw and its application to the facts presented here.

a. Petitioner asserts that a split exists among the Circuits whether the ordinary course of business defense can be applied to a payment if it is the first payment of its kind by the debtor to the allegedly preferred creditor. To demonstrate the existence of such a "split," Petitioner invokes the decision of the Sixth Circuit in *In re Finn*, 909 F.2d 903 (1990), which held that "a transaction can be in the ordinary course . . . even if it is the first such transaction undertaken by the customer." *Id.* at 903, quoted at Petition 22. However, in a footnote (n. 8 at 23), Petitioner concedes that *Finn*'s holding that a transaction can be ordinary even if it is the first of its kind related to section 547(c)(2)(*A*), which looks to whether the obligation was *incurred* in the ordinary course, not 547(c)(2)(*B*), which looks to whether the *payment* is ordinary in the debtor/creditor

relationship. Thus, *Finn* held that the fact that the debtor had never before *incurred* long-term consumer debt ought not as a matter of law deprive a payment of that debt — made as part of a series of regular payments spanning over a year (thus satisfying section 547(c)(2)(*B*)) — of the benefit of the ordinary course defense. *Id.* at 908. *Finn* is thus irrelevant to this case, which was decided on the basis of section 547(c)(2)(*B*).

Moreover, even if *Finn* were on point, the Seventh Circuit did not rule that Bergner's payments to Bank One were outside the ordinary course of business because such payments had never been made before. On the contrary, the very nature of the payments — substantial lump-sum payments, precipitated by Bank One's decision not to renew the letters of credit in light of Bergner's precarious financial situation, which relieved Bank One entirely of its very significant unsecured exposure on the eve of bankruptcy — planted them firmly outside the ordinary course of Bergner's business. Pet. App. 21a-22a. Again, the fact-specific basis for the Seventh Circuit's decision does not conflict with the Sixth Circuit's decision in *Finn*.

b. Petitioner next asserts the existence of a conflict among the Circuits as to whether a payment is eligible for the ordinary course defense only if such payment would have been made by the debtor when it was "financially healthy." Petition 23-25. The cases invoked by Petitioner to create this conflict, however, stand for a proposition that has no relevance to the case at bar, to wit, that the ordinary course defense may be available to a creditor which has received payments during the preference period pursuant to a debt restructuring agreement. *See In re Roblin Industries, Inc.*, 78 F.3d 30, 41-42 (2d Cir. 1996) (holding that payments made pursuant to debt restructuring agreements are not disqualified as a matter of law from satisfying the requirement of 11 U.S.C. § 547(c)(2)(*C*) that the payment be made according to ordinary business terms); *In re*

U.S.A. Inns of Eureka Springs, Arkansas, Inc., 9 F.3d 680, 685 (8th Cir. 1993) (evidence of existence of "a prevailing practice" in the industry in restructuring troubled real estate loans can satisfy 11 U.S.C. § 547(c)(2)(*C*)); *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 487-88 (4th Cir. 1992) (debtor's liability for line of credit obtained from bank by debtor's principals on debtor's behalf constituted "debt incurred by the debtor in the ordinary course of business" for purposes of 11 U.S.C. § 547(c)(2)(*A*)).

These cases present no conflict with the Seventh Circuit's ruling in this case. Indeed, none of the cases even addresses 11 U.S.C. § 547(c)(2)(*B*), the subsection at issue here, which looks to whether the making of the payment was ordinary in the debtor/creditor relationship. Moreover, this case involved no debt restructuring. Quite to the contrary, Petitioner simply pulled the plug, extracting payment in full on its unsecured obligations. Petitioner cites no Court of Appeals case holding that a one-time payoff of a significant unsecured debt in response to a creditor's demand, based on the debtor's financial distress, is in the ordinary course of business under 11 U.S.C. § 547(c)(2)(B). Indeed, any such ruling would run counter to the most fundamental principles of preference law:

> The operation of the preference section to deter "the race of diligence" of creditors to dismember the debtor before bankruptcy furthers the second goal of the preference section — that of equality of distribution.

Union Bank v. *Wolas*, 502 U.S. 151, 161 (1991) (quoting H.R. Rep. No. 95-595, p. 117-78 (1977), U.S. Code Cong. & Admin. News 1978, pp. 6137, 6138).

Accordingly, the Seventh Circuit's decision in respect of the ordinary course of business defense likewise is not in conflict with a decision of any other Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PROFESSOR ELIZABETH WARREN
Counsel of Record
Cambridge, MA 02138
(617) 495-3101

AMY R. WOLF
DOUGLAS K. MAYER
DAVID C. BRYAN
WACHTELL, LIPTON,
ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

CHARLES J. HANSEN
Vice President and
Associate General Counsel
Saks Incorporated
750 Lakeshore Parkway
Birmingham, AL 35211
(205) 940-4600

Attorneys for Respondent